

Message Text

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ACTION IO-14

INFO OCT-01 ISO-00 CIAE-00 DODE-00 PM-05 H-01 INR-07
L-03 NSAE-00 PA-01 PRS-01 SP-02 SS-15 EB-08
LAB-04 SIL-01 AF-10 ARA-10 EA-10 EUR-12 NEA-10
SSO-00 /115 W
-----105522 192004Z /63

R 191755Z AUG 77
FM USMISSION GENEVA
TO SECSTATE WASHDC 0476
INFO USIA WASHDC
USMISSION USUN NY
USDOC WASHDC
WHITE HOUSE WASHDC

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DEPT PASS: SECRETARY VANCE AND LABOR FOR SECRETARY MARSHALL
AND HOROWTIZ. USUN FOR AMB YOUNG; COMMERCE FOR SECRETARY
KREPS; WHITE HOUSE FOR BRZEZINSKI, JORDAN, WATSON, EIZENSTAT;
IO FOR ASST SECY MAYNES, DEPUTY ASST SECY DALLEY AND ALLISON
PALMER; L FOR HANSELL; S/IL FOR GOOD; S/P FOR LAKE. USIA FOR
RHINEHART.

E.O. 11652: N/A
TAGS: ILO
SUBJ: ILO LEGAL ADVISOR'S OPINION ON EXTENSION OF NOTICE

REF: A. GENEVA 7146; B. GENEVA 7147

IN RESPONSE TO AN OFFICIAL REQUEST FROM THE CANADIAN GOVT, THE
LEGAL ADVISOR OF THE ILO ISSUED THE FOLLOWING OPINION ON THURS-
DAY, AUGUST 18 CONCERNING THE POSSIBILITY OF A STATE EXTENDING
A NOTICE OF INTENT TO WITHDRAW FROM ILO:

1. ARTICLE 1, PARAGRAPH 5 OF THE CONSTITUTION OF THE ILO PRO-
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VIDES AS FOLLOWS:

"5. NO MEMBER OF THE INTERNATIONAL LABOUR ORGANISATION MAY
WITHDRAW FROM THE ORGANISATION WITHOUT GIVING NOTICE OF ITS
INTENTION SO TO DO TO THE DIRECTOR-GENERAL OF THE INTERNATION-
AL LABOUR OFFICE. SUCH NOTICE SHALL TAKE EFFECT TWO YEARS AFTER
THE DATE OF ITS RECEPTION BY THE DIRECTOR-GENERAL, SUBJECT TO

THE MEMBER HAVING AT THAT TIME FULFILLED ALL FINANCIAL OBLIGATIONS ARISING OUT OF ITS MEMBERSHIP. WHEN A MEMBER HAS RATIFIED ANY INTERNATIONAL LABOUR CONVENTION, SUCH WITHDRAWAL SHALL NOT AFFECT THE CONTINUED VALIDITY FOR THE PERIOD PROVIDED FOR IN THE CONVENTION OF ALL OBLIGATIONS ARISING THEREUNDER OR RELATING THERETO."

2. THAT PROVISION WAS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE IN 1945. THERE WAS NO DISCUSSION OF IT AT THE CONFERENCE, BUT THE OFFICE REPORT WHICH PROPOSED IT (REPORT IV(1) TO THE 27TH SESSION OF THE CONFERENCE, PP. 86-89) INDICATED THAT IT REPRESENTED, GENERALLY SPEAKING, THE CARRY-OVER OF THE (PRE-WAR) SYSTEM WHICH HAD PREVIOUSLY BEEN INDIRECTLY APPLICABLE TO THE ORGANISATION BY VIRTUE OF THE CORRESPONDING PROVISION OF THE COVENANT OF THE LEAGUE OF NATIONS. THAT PROVISION READ AS FOLLOWS: "ANY MEMBER OF THE LEAGUE MAY, AFTER TWO YEARS' NOTICE OF ITS INTENTION SO TO DO, WITHDRAW FROM THE LEAGUE, PROVIDED THAT ALL ITS INTERNATIONAL OBLIGATIONS AND ALL ITS OBLIGATIONS UNDER THIS COVENANT SHALL HAVE BEEN FULFILLED AT THE TIME OF ITS WITHDRAWAL."

3. BOTH THE COVENANT OF THE LEAGUE AND THE CONSTITUTION OF THE ILO ARE INTERNATIONAL TREATIES SUBJECT TO THE GENERAL RULES OF INTERNATIONAL LAW CONCERNING THE INTERPRETATION OF TREATIES. AS STATED IN ARTICLE 31 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES, THE GENERAL RULE OF INTERPRETATION IS THAT "A TREATY LIMITED OFFICIAL USE

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SHALL BE INTERPRETED IN GOOD FAITH IN ACCORDANCE WITH THE ORDINARY MEANING TO BE GIVEN TO THE TERMS OF THE TREATY IN THEIR CONTEXT AND IN THE LIGHT OF ITS OBJECT AND PURPOSE". THAT ARTICLE FURTHER INDICATES THAT THERE SHALL BE TAKEN INTO ACCOUNT, INTER ALIA, "ANY SUBSEQUENT PRACTICE IN THE APPLICATION OF THE TREATY WHICH ESTABLISHES THE AGREEMENT OF THE PARTIES REGARDING ITS INTERPRETATION". AND ARTICLE 32 PROVIDES THAT RECOURSE MAY BE HAD TO SUPPLEMENTARY MEANS OF INTERPRETATION, INCLUDING THE PREPARATORY WORK OF THE TREATY, IN ORDER TO CONFIRM THE MEANING RESULTING FROM THE APPLICATION OF ARTICLE 31 OR TO DETERMINE THE MEANING WHEN INTERPRETATION ACCORDING TO ARTICLE 31 LEAVES THE MEANING AMBIGUOUS OR LEADS TO A MANIFESTLY UNREASONABLE RESULT.

4. MOREOVER ARTICLE 37 OF THE CONSTITUTION OF THE ILO PROVIDES THAT ANY QUESTION OR DISPUTE RELATING TO THE INTERPRETATION OF THE CONSTITUTION SHALL BE REFERRED FOR DECISION TO THE INTERNATIONAL COURT OF JUSTICE. THIS MEANS THAT, WHERE THERE IS FOUND TO BE POSSIBLE AMBIGUITY IN THE TERMS OF THE CONSTITUTION, AND THE STATES MEMBERS OF THE ORGANISATION DO NOT AGREE ON THE INTERPRETATION, ONLY THE COURT CAN GIVE AN AUTHORITATIVE ANSWER. IT IS, OF COURSE, POSSIBLE THAT THERE IS NO "QUESTION OR

DISPUTE" BETWEEN STATES MEMBERS OF THE ORGANISATION ON THE INTERPRETATION. THE ROLE OF THE LEGAL ADVISER IN THE PROCESS IS TO TENDER ADVICE, ON REQUEST, TO THE MEMBER STATES IN THAT CONNECTION.

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DEPT PASS: SECRETARY VANCE AND LABOR FOR SECRETARY MARSHALL AND HOROWTIZ; USUN FOR AMB YOUNG; COMMERCE FOR SECRETARY KREPS; WHITE HOUSE FOR BRZEZINSKI, JORDAN, WATSON; EIZENSTAT; IO FOR ASST SECY MAYNES, DEPUTY ASST SECY DALLEY AND ALLISON PLAMER; L FOR HANSELL; S/IL FOR GOOD; S/P FOR LAKE. USIAIFOR RHINEHART.

5. AS INDICATED ABOVE, ARTICLE 1, PARAGRAPH 5 OF THE CONSTITUTION PROVIDES THAT A NOTICE OF INTENTION TO WITHDRAW "SHALL TAKE EFFECT TWO YEARS AFTER THE DATE OF ITS RECEPTION BY THE DIRECTOR-GENERAL..."("PORTERA EFFET DEUX ANS APRES..."). THE QUESTION WHICH ARISES IS WHETHER THE "ORDINARY MEANING" OF THAT PROVISION IS THAT IT IS A CONSTITUTIONAL REQUIREMENT THAT MEMBERSHIP CASE AT PRECISELY THAT DATE-NEITHER BEFORE NOR AFTER.

6. TEXTUALLY THE LANGUAGE OF THE CONSTITUTION LENDS ITSELF BOTH TO THE MEANING THAT, AS FROM THE DATE ON WHICH THE NOTICE "TAKES EFFECT", THE STATE CONCERNED CEASES TO BE A MEMBER,
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AND ENTITLED TO CEASE TO BE A MEMBER (BUT MAY, IF IT SO WISHES, PROLONG ITS MEMBERSHIP). THAT BEING SO, RECOURSE TO THER RELEVANT ELEMENTS IS NECESSARY.

7. THERE IS NO "SUBSEQUENT PRACTICE" WHICH CAN BE SAID TO "ESTABLISH THE AGREEMENT OF THE PARTIES" REGARDING THE INTERPRETATION OF THE RELEVANT TERMS OF THE CONSTITUTION. ADMITTEDLY, IN THE CASE OF ALL STATES WHICH HAVE GIVEN NOTICE OF WITHDRAWAL AND HAVE NOT WITHDRAWN THAT NOTICE BEFORE THE EXPIRY OF TWO YEARS, MEMBERSHIP WAS CONSIDERED TO HAVE CEASUED ON THE DATE ON WHICH THE NOTICE "TOOK EFFECT". HOWEVER, IN ALL THESE CASES, IT WAS THE DECISION OF THE STATE CONCERNED (NORMALLY EXPRESSLY STATED IN THE NOTICE) TO WITHDRAW BY THAT DATE. THE QUESTION OF A POSSIBLE EXTENSION OF NOTICE NOT HAVING ARISEN, AN "OPINIO JURIS" OF THE OTHER MEMBER STATES COULD NOT HAVE COME INTO BEING.

8. SUCH PREPARATORY WORK AS THERE IS (AS INDICATED, THERE IS ONLY AN OFFICE REPORT TO THE 1945 SESSION OF THE CONFERENCE) CONTAINS TWO ELEMENTS SUGGESTING THAT AN EXTENSION OF NOTICE IS POSSIBLE. FIRST, THE TWO YEAR PERIOD IS DESCRIBED AS A "MINIMUM" PERIOD OF NOTICE (P. 87 OF THE ENGLISH TEXT). SECOND, AS RECALLED ABOVE, IT MAKES CLEAR THAT PARAGRAPH 5 OF ARTICLE 1 IS BASED ON THE RELEVANT PROVISION OF THE COVENANT OF THE LEAGUE; THAT PROVISION WAS DIFFERENTLY DRAFTED, TO READ THAT "ANY MEMBER...MAY, AFTER TWO YEARS' NOTICE OF ITS INTENTION SO TO DO, WITHDRAW..."; THE DRAFTING CHANGE MADE IN THE ILO CONSTITUTION IS NOT INDICATED AS BEING A CHANGE OF SUBSTANCE. 9 IT IS, HOWEVER, THE CONTEXT OF THE PHRASE AT ISSUE, IN THE LIGHT OF THE OBJECT AND PURPOSE OF THE CONSTITUTION, WHICH IS MOST ILLUMINATING:

(A) THE ESSENCE OF PARAGRAPH 5 OF ARTICLE 1 OF THE CONSTITUTION
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IS THAT NO STATE MAY WITHDRAW WITHOUT HAVING GIVEN TWO YEARS' NOTICE OF ITS INTENTION SO TO DO. THE PURPOSE OF THE NOTICE PERIOD IS TO GIVE THE ORGANIZATION TIME TO ADJUST TO THE CONSEQUENCES OF WITHDRAWAL, PARTICULARLY THE FINANCIAL CONSEQUENCES. THIS IS ADEQUATELY CONFIRMED IN THE "PREPARATORY WORK" (WHICH EXPRESSLY REJECTS A POSSIBLE ONE YEAR NOTICE PERIOD). THE CONSIDERATIONS WHICH MAKE IMPOSSIBLE WITHDRAWAL AFTER LESS THAN TWO YEARS DO NOT APPLY TO A LONGER NOTICE PERIOD. A STATE WHICH, SAY, GAVE THREE YEARS' NOTICE FROM THE BEGINNING WOULD GIVE THE ORGANIZATION GREATER TIME

TO ADJUST, WHILE AN EXTENSION OF NOTICE WOULD PERMIT RELAXATION OF ANY CONSERVATORY MEASURES ALREADY TAKEN OR PLANNED TO THE EXTENT CONSISTENT WITH THE EXTENSION.

(B) THE AIM OF THE MEMBERSHIP PROVISIONS OF THE CONSTITUTION IN THEIR ENTIRETY IS TO ACHIEVE UNIVERSALITY; THIS IS MADE AMPLY CLEAR BY THE RECORDS OF THE 1945 SESSION OF THE CONFERENCE, AS WELL AS VARIOUS PROVISIONS IN THE PREAMBLE TO THE CONSTITUTION AND THE DECLARATION OF PHILADELPHIA ANNEXED THERETO. IN THAT LIGHT, IT WOULD NOT MAKE SENSE TO REQUIRE THAT MEMBERSHIP CEASE AT A TIME WHEN THE STATE CONCERNED IS PREPARED TO CONTINUE MEMBERSHIP AT LEAST FOR A SPECIFIED FURTHER PERIOD.

10. AN EXTENSION OF NOTICE OF WITHDRAWAL WOULD THUS SEEM TO BE LEGALLY PERMISSIBLE.

11. IT WOULD APPEAR, AT THE SAME TIME, THAT THE ORGANISATION AS A WHOLE AND THE OTHER PARTIES TO ITS CONSTITUENT INSTRUMENT ARE ENTITLED TO BE CLEAR AS TO THE TERMS OF SUCH EXTENSION AS FROM THE MOMENT THAT IT BEGINS TO RUN; IN PARTICULAR THEY HAVE AN INTEREST IN CERTAINTY AS TO THE PERIOD OF TIME ON WHICH THE EXTENSION BEARS.

12. FINALLY, IT IS CLEAR THAT, DURING ANY EXTENSION OF NOTICE, THE STATE CONCERNED HAS ALL THE RIGHTS AND OBLIGATIONS (INCLUDING THE FINANCIAL OBLIGATIONS) PERTAINING TO MEMBERSHIP. UNQUO LIMITED OFFICIAL USE

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Message Attributes

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